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QUESTIONS RELATED TO SECRET AND CONFIDENTIAL DOCUMENTS

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REPORT

of the

SPECIAL COMMITTEE TO STUDY QUESTIONS RELATED TO SECRET AND CONFIDENTIAL GOVERNMENT DOCUMENTS

In accordance with the provisions of S. Res. 13, the Special Committee to Study Questions Related to Secret and Confidential Documents submits the following report and recommendations.

The Committee was aided in its work by the Legislative Reference Service of the Library of Congress and wishes to commend Mr. Robert Lauck and Mr. David Sale of that service for their contributions.

This report covers questions relating to (1) access to classified information by Members of Congress, (2) legal rights of an individual Senator with respect to classified documents in his possession, (3) legal rights of a Senate Committee with respect to classified documents in its possession, (4) legal rights of individual members with respect to documents on information received from foreign emissaries, (5) the declassification of documents in the possession of an individual member, (6) pending bills and proposals for Congressional machinery to oversee classified information matters and (7) recommendations by the Committee.

I. ACCESS TO CLASSIFIED INFORMATION BY MEMBERS OF CONGRESS

The Freedom of Information Act (FOIA), Pub. L. 89-487, 80 Stat. 250, 5 U.S.C. 552, amending the Administrative Procedure Act, (5 U.S.C. 551, *et seq.*), enunciates a policy of public disclosure and access to information generated by Federal agencies.

Beginning with the access problem in the context of the Freedom of Information Act, the first two questions are: (1) What limitations are provided by the Act on public disclosure of classified information? and, (2) do these limitations apply to Members and committees of Congress?

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There are nine specific exemptions to disclosure of information to the public. The one relating to classified information occurs at 5 U.S.C. 552(b)(1):

> (b) This section does not apply to matters that are—
> (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy; . . .

The limitation, then, depends upon there having been a determination under an Executive order that a document should be classified "in the interest of national defense or foreign policy." The current order under which such determinations are made is Ex. Ord. 11652, issued by the President on March 10, 1972, to take effect June 1, 1972. The order is discussed in detail in our first report.

On the question of access to classified information the order is important as the basis or *origin* or any limitation. To repeat, the exemption applies to "matters . . . required by an Executive Order important as the basis or *origin* or any limitation. To repeat, the to be kept secret . . ." Given a classification of documents by the proper executive department official pursuant to terms of the Executive Order, what *right* is there, first, for a private individual and, second, for a Member of Congress, to gain access to the documents?

The first part of this question was considered by the Supreme Court in *Environmental Protection Agency, et al.* v. *Mink, et al.*,—— U.S.——, 35 L. Ed. 2d 119, Docket 71–909 (January 22, 1973).

Congresswoman Patsy T. Mink and several other Members of Congress (in their capacities as private individuals, as it developed) sought to compel disclosure of certain documents relating to proposed nuclear testing at Amchitka Island, Alaska. The documents with which this paper is concerned were those that had been classified "Top Secret" and "Secret" under Executive Order 10501, predecessor to the current order, E. O. 11652. (Several unclassified documents were sought to be withheld on the basis of exemption (b)(5) "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." The part of the opinion applying only to exemption (5) is not discussed here.)

It was held by the court that exemption (b)(1) prevents disclosure of the classified documents. The exemption also does not permit *in camera* inspection of the documents to identify unclassified or "non-secret components" for disclosure. The Court of Appeals had read the exemption as applying only to the portions of the documents that were secret. At the direction of the Appeals Court, the District Court was to identify any non-secret portions for release. But the majority opinion of the Supreme Court turned down this view, concluding that the sole finding for the court was whether the material had been classified by Executive order as contemplated by (b)(1).

In stating this conclusion, the majority opinion relied on the language of the exemption and the legislative history.

The language of the exemption, quoted above, includes the test "required by Executive order to be kept secret . . ." The court said:

> Obviously, this test was not the only alternative available. But Congress chose to follow the Executive's determination in these matters and that choice must be honored. *Id.*, L. Ed. p. 129.

In his concurring opinion, Mr. Justice Stewart agreed with the majority that the Freedom of Information Act at sec. 552(b)(1) forecloses any judicial inquiry into the classification of documents:

> [Congress] has built into the Freedom of Information Act an exemption that provides no means to question an Executive decision to stamp a document "secret", however cynical, myopic, or even corrupt that decision might have been . . .
> . . . [T]he only "matter" to be determined *de novo* [referring to Mr. Justice Brennen's discussion of sec. 552(a)(3) in dissent] under sec. 552(b)(1) is whether in fact the President has required by Executive Order that the documents in question are to be kept secret. Under the Act as written, that is the end of the inquiry. *Id.*, L. Ed. p. 136.

As stated above, the court held that its view was also supported by the legislative history of the Act:

> . . . [T]he legislative history disposes of any possible argument that Congress intended the Freedom of Information Act to subject executive security classifications to judicial review at the insistence of anyone who might seek to question them. Thus, the House Report stated with respect to subsection (b)(1) that 'citizens both in and out of Government can agree to restrictions on categories of information which the President has determined must be kept secret to protect the national defense or to advance foreign policy, such as matters classified pursuant to Executive Order 10501.' H. Rep. No. 1497, pp. 9–10. Similarly, Representative Moss, Chairman of the House Subcommittee that considered the bill, stated that the exemption 'was intended to specifically recognize that Executive order [No. 10501]' and was drafted 'in conformity with that Executive order.' Hearings before a Subcommittee of the House Committee on Government Operations, 'Federal Public Records Law', 89th Cong., 1st Sess. (March and April 1965), pp. 52, 105 (hereinafter, 1965 House Hearings). And a member of the committee, Representative Gallagher, stated that the legislation and the Committee Report make it 'crystal clear that the bill in no way affects categories of information which the President . . . has determined must be classified to protect the national defense or to advance foreign policy. These areas of information most generally are classified under Executive Order No. 10501.' 112 Cong. Rec. 13659.
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> These same sources make untenable the argument that classification of material under Executive Order 10501 is somehow insufficient for Exemption 1 purposes, or that the exemption contemplates the issuance of orders, under some other authority, for each document the Executive may want protected from disclosure under the Act. Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures—subject only to whatever limitations the Executive privilege may be held to impose upon such congressional ordering. Cf. *United States* v. *Reynolds*, 345 U.S. 1 (1953). But Exemption 1 does neither. It states with the utmost

> directness that the Act exempts matters 'specifically required by Executive order to be kept secret.' Congress was well aware of the Order and obviously accepted determinations pursuant to that Order as qualifying for exempt status under sec. (b)(1). In this context it is patently unrealistic to argue that the 'Order has nothing to do with the first exemption.'
>
> What has been said thus far makes wholly untenable any claim that the Act intended to subject the soundess of executive security classifications to judicial review at the insistence of any objecting citizen. It also negates the proposition that Exemption 1 authorizes or permits *in camera* inspection of a contested document bearing a single classification so that the court may separate the secret from the supposedly nonsecret and order disclosure of the latter. *Id.*, L. Ed. pp. 129–30.

The *Senate Report*, S. Rep. No. 813, 89th Cong., 1st Sess. (1965), apparently more favorably disposed to public disclosure, was before both Houses at the time of the passage of the Freedom of Information Act while the *House Report* was not before the Senate when it passed the Act. Commentators have thus opined that the *Senate Report* should carry more weight in interpretation of the provisions of the Act. (See K. C. Davis, *Administrative Law*, sec. 3A. 2, at 117 (1970 Supp.)). The majority of the court appears satisfied, however, that the opinion is supported by the legislative history represented by both Reports.

Thus, on the question whether Congress intended to subject any particular document to judicial review to determine whether it was properly classified, Mr. Justice Stewart capsulizes the majority opinion based on both statutory language and legislative history: ". . . Congress chose . . . to decree blind acceptance of executive fiat." *Id.*, L. Ed. p. 137.

The separate dissenting views of Mr. Justice Brennen (joined by Mr. Justice Marshall) and Mr. Justice Douglas vigorously dispute the majority opinion. As to legislative intent:

> We have the word of both Houses of Congress that the *de novo* proceeding requirement [(a)(3)] was enacted expressly 'in order that the ultimate decision as to the propriety of the agency's action is made by the court and prevent it from becoming meaningless judicial sanctioning of agency discretion.' S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965) (hereinafter cited as S. Rep. No. 813); H. Rep. No. 1497, 89th Cong., 2d Sess. 9 (1966) (hereinafter cited as H. Rep. No. 1497). What was granted, and purposely so, was a broad grant to the District Court of 'authority whenever it considers such action equitable and appropriate to enjoin the agency from withholding its records and to order the production of agency records improperly withheld.' H. Rep. No. 1497, at 9. And to underscore its meaning Congress rejected the traditional rule of deference to administrative determinations by '[p]lacing the burden of proof upon the agency' to justify the withholding. S. Rep. No. 813, at 8; H. Rep. No. 1497, at 9. The Court's rejection of the Court of Appeals' construction is inexplicable in the face of this overwhelming evidence of the congressional design.

Two questions were posed at the beginning of this discussion on access to classified information. The first, discussed above, concerns

limitations to access to such information by the *public* under the Freedom of Information Act. Given the general limitation of (b)(1) discussed above, the next question is whether the limitations applying to public access apply equally to Members of Congress in their capacity as Members.

This question was not ruled upon by the Supreme Court in the *Mink* case because Congresswoman Mink and her colleagues were not before the Court as Members but as private individuals. The threshold question of the Members' *standing to sue* as Members was challenged in the District Court, which granted a motion to dismiss on this point. The Court of Appeals did not consider the issue. Consequently, the next question, whether Mrs. Mink and other Congressmen who brought the suit were entitled to the classified documents as Members even though not as private individuals, was not decided by the Supreme Court.

The question of standing to sue by a Member of Congress in his or her official capacity has not been addressed by the Supreme Court. It received renewed attention recently in the lower courts.

In *Reed* v. *County Commissioners*, 277 U.S. 376, 72 Law. Ed. 924, (1928), petitioners were U.S. Senators, members of a Committee organized and acting pursuant to a Senate Resolution. Upon refusal of those in charge of certain evidence (ballot boxes, etc.) to produce it for the Committee's use, the Senators brought suit. The court said that without express authority from the Senate to bring suit if necessary to perform its duties under the Resolution (which had not itself provided such authority), the Senators had no standing to sue.

> Authority to exert the powers of the Senate to compel production of evidence differs widely from authority to invoke judicial power for that purpose . . . Petitioners are not 'authorized by law to sue.' (at 389).

In short, the Senators were said to have no standing to sue in their official capacity even as a means of carrying out the stated purpose of a Senate Resolution when no action of the body as a whole authorized the use of such process. (An interesting historical note is that on the same day the case was decided, May 28, 1928, the Senate passed a Standing Order authorizing any committee to bring suit in any court when in its opinion the suit is necessary to the performance of duties imposed by the Constitution, Resolution of the Senate, or other law. S. Jour. 572, 70–1, May 28, 1928; Reprinted in Senate Manual, Senate Document No. 1, 89th Cong., 1st Sess.).

The question of standing of a Member of Congress to bring suit in his or her official capacity has been considered and decided in several recent cases. In *Mitchell* v. *Laird*, No. 71–1510 (D.C. Cir. March 20, 1973), the court considered whether thirteen Congressmen had standing to seek declaratory and injunctive relief against continued warfare in Indochina. Plaintiffs had, according to the court, implicitly premised their standing claim on Congress' "*exclusive* right to decide whether the United States should fight *all* types of wars." Without agreeing with this assertion, the court had no difficulty finding for the Congressmen on the standing issue:

> However, plaintiffs are not limited by their own concepts of their standing to sue. We perceive that in respects which they have not alleged they may be entitled to complain. If we, for the moment, assume that defendants' actions in

> continuing the hostilities in Indo-China were or are beyond the authority conferred upon them by the Constitution, a declaration to that effect would bear upon the duties of plaintiffs to consider whether to impeach defendants, and upon plaintiffs' quite distinct and different duties to make appropriations to support the hostilities, or to take other legislative actions related to such hostilities, such as raising an army or enacting other civil or criminal legislation. *In our view, these considerations are sufficient to give plaintiffs a standing to make their complaint.* Cf. *Flast* v. *Cohen*, 392 U.S. 83 (1968); *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970); *Barlow* v. *Collins*, 397 U.S. 159 (1970).

Thus, apparently, where the performance of legislative duties is dependent upon, or related to, the relief sought or there is otherwise a legislative reason for the action, Members of Congress have standing to sue in their official capacity. The reasoning seems effectively to premise standing on any valid "legislative purpose", to use a familiar phrase, and must be viewed as going further than did the *Reed* case, *supra*. It can be argued that the same test applied in *Reed* would have allowed standing for the Members of the Senate committee to bring suit in pursuance of its purpose of legislating in the election law field without the express authority to do so provided by the Standing Order passed later by the Senate.

The points involved in the Congressional standing issue were outlined in the very recent case of *Holtzman* v. *Richardson*, No. 73–C–537 (D.C. E.D.N.Y., June 13, 1973), in which Congresswoman Holtzman's standing to sue in her official capacity was upheld:

> Under Article III, sec. 2, Clause 1, of the Constitution, the jurisdiction of federal courts is limited to "cases" and "controversies." Judicial definitions of the elements requisite for "cases" and "controversies" have proved to be elusive.
>
> Unlike case or controversy, terms specifically enumerated in Article III, "standing" is not mentioned in the Constitution. It received its first full expression in *Frothingham* v. *Mellon*, 262 U.S. 447, 43 S. Ct. 597 (1923).
>
> Later, in *Flast* v. *Cohen*, 392 U.S. 83, 88 S. Ct. 1942 (1968), the Court stated that political questions, advisory opinions, and lack of standing result in there being no justiciable controversy. Whether standing is denominated a component of jurisdiction or of justiciability may at first blush seem unimportant, due to the requirement that both issues must be resolved before any determination can be made of the merits of the controversy. *Baker* v. *Carr*, 369 U.S. 186, 82 S. Ct. 691 (1962); *DaCosta* v. *Laird*, 471 F. 2d 1146 (2d Cir. 1973). However, a complaint may be dismissed for lack of jurisdiction of the subject matter only if the claim is so attenuated and insubstantial as to be absolutely devoid of merit. *Newburyport Water Co.* v. *Newburyport*, 193 U.S. 561, 24 S. Ct. 553 (1904); *Baker* v. *Carr*, *supra*.
>
> Plaintiff has raised a serious constitutional question dealing with the war-making power of Congress enumerated in Article I, sec. 8 of the Constitution. The seriousness of this

question has been recognized repeatedly within this circuit. *Berk* v. *Laird*, 429 F. 2d 302 (2d Cir. 1970); *Orlando* v. *Laird*, 443 F. 2d 1039 (2d Cir. 1971). The delicate balance in the relationship between Congress and the President concerning the power to wage war is a controversy arising under the Constitution and therefore within the jurisdiction of this court. 28 U.S.C. sec. 1331(a).

Whether a particular party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of it is what has traditionally been referred to as the question of standing to sue. In *Sierra Club* v. *Morton*, 405 U.S. 727, 732, 92 S. Ct. 1361, 1364 (1972), the Supreme Court held that when a party, such as the plaintiff here, does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a "personal stake in the outcome of the controversy," *Baker* v. *Carr* . . . as to ensure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Flast* v. *Cohen*.

The heart of the question becomes whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to assure the concrete presentation of issues in an adversary context so that a court will be properly guided in determining difficult issues. The controversy involved must be a substantial one admitting of specific relief. *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 57 S. Ct. 461 (1937).

In the present case the court is not being asked to decide ill-defined controversies over constitutional issues. The issue has been focused as sharply as possible: Whether the President's orders directing the bombing of Cambodia constituted a usurpation of Congress' war making power under Article I, sec. 8 of the Constitution. Nor is this a case in which the court is being asked to decide a hypothetical question or abstract issue. Plaintiff is not asking for a determination whether the President would violate the Constitution by engaging in certain acts, but rather a determination that the present action of the President violates the Constitution. Nor is this a collusive suit where the parties are suspected of sharing the same interests.

Plaintiff *qua* Congresswoman does not merely suffer in some indefinite way in common with people generally. She is a member of a specific and narrowly defined group—the House of Representatives. As a Congresswoman, plaintiff is called upon to appropriate funds for military operations, raise an army, and declare war. Additionally, plaintiff has a continuing responsibility to insure the checks and balances of our democracy through the use of impeachment. When a plaintiff is a member of a narrowly defined group, which has been more directly affected by the conduct in question than has the general population, the test for standing should be met. Scott, *Standing in the Supreme Court—a Functional Analysis*, 86 Harv. L. Rev. 645 (Feb. 1973).

> The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the federal government. *Flast* v. *Cohen, supra.*

An injunction was granted in the *Holtzman* case on July 25, 1973, was a stay pending argument before the Court of Appeals for the Second Circuit on July 27. The appeals court has now granted a stay of the injunction until August 13.

To return to the *Mink* case, might the result have been different had the standing question been before the Supreme Court and had it been answered as it was in the *Mitchell* and *Holtzman* cases?

It is to be noted that no mention was made in the *Mink* case, even by the dissenters, of a provision of the Freedom of Information Act that would appear to be of primary importance in determining Congressional intent in passing the Act:

> (c) . . . This section [including the classified information "exemption"] is not authority to withhold information from Congress.

Query whether the Court would reach the same result as to the classified information exemption of (b)(1) if a Member of Congress is found to have standing to challenge the exemption in his or her official capacity. Obviously, this conjecture assumes that the Court will follow the *Mitchell* and *Holtzman* cases on standing the issue.

USE AND HANDLING OF CLASSIFIED DOCUMENTS

Several questions were posed by the Committee regarding the appropriate disposition that could be made of classified documents by Members and committees of the Congress. In the discussions of these questions that follow no assumption is made about the classified documents except that they have been regularly classified, whether or not with good reason, and that they have come into the possession of a Member of a Committee.

LEGAL RIGHTS OF AN INDIVIDUAL SENATOR WITH RESPECT TO CLASSIFIED DOCUMENTS IN HIS POSSESSION

There are various provisions of the *United States Code* which may be applicable to persons in possession of classified documents. While the following listing is not intended to be exhaustve, it does provide some general insight into the type of individual conduct which is proscribed.

1. 18 U.S.C. secs. 792–799 (Espionage and Censorship): Sec. 793—gathering, transmitting, or losing defense information.

Sec. 794—gathering or delivering defense information to aid a foreign government.

Sec. 795—photographing or sketching defense installations.

Sec. 797—publication and sale of photographs of defense installations.

Sec. 798—disclosure of classified information.

2. 18 U.S.C. sec. 1905 (Public Officers and Employees): Sec. 1905—disclosure of confidential information generally.

3. 18 U.S.C. sec. 2071 (Records and Reports): Sec. 2071—concealment, removal, or mutilation of records and reports, such as those on file or deposited with any public officer of the United States.

4. 18 U.S.C. sec. 641 (Embezzlement and Theft): Sec. 641–receiving, concealing, or retaining stolen government documents.

5. 18 U.S.C. sec. 371 (Conspiracy): Sec. 371—conspiracy to commit any offense against the United States.

6. 43 U.S.C. secs. 2274–2277 (Development and Control of Atomic Energy): Sec. 2274—communicating or disclosing restricted data. Such data includes information concerning the design, manufacture, or utilization of atomic weapons, the production of special nuclear material, or the use of special nuclear material in the production of energy. See 42 U.S.C. sec. 2014(y).

7. 50 U.S.C. sec. 783 (Internal Security): Sec. 783(b)—communication of classified information by government officer or employee.

For a detailed examination of these statutes, see Edgar and Schmidt, "The Espionage Statutes and Publication of Defense Information," 73 *Col. L. Rev.* 929 (May 1973). (Tab. 1).

The question of the extent to which an individual Member, or his aide, may be immune from the operation of these or other criminal provisions, when the Member or aide possesses a classified document, has received some recent clarification in *Gravel* v. *United States*, 408 U.S. 606 (1972). [Tab. 2]. See also *United States* v. *Brewster*, 408 U.S. 501 (1972).

On the basis of the *Gravel* decision it would seem possible to construct several categories of activities and conduct in which an individual Member may safely engage when he possesses a classified document. However, before considering protected and proscribed conduct some analysis of the *Gravel* decision is in order.

Article I, section 6, clause 1, of the United States Constitution provides as follows:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and Paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

In writing for the Court majority, Mr. Justice White indicated that the Privilege from Arrest, guaranteed by this Article, extends only to a privilege from civil arrest (a practice common at the time the Constitution was adopted), and does not immunize Members from the operation of the ordinary criminal laws. *Gravel* v. *United States*, 408 U.S. 606, 614–615 (1972). Thus, a Member would be generally bound by the operation of those criminal laws which regulate conduct with respect to the handling of classified documents.

The Court's analysis of the scope of protection afforded Members by the last clause of Article 1, section 6, clause 1 (the Speech and Debate Clause), however, has important implications for an individual Member in possession of a classified document. Explaining that the

Speech and Debate Clause does not broadly exempt that which the Privilege from Arrest Clause allows (i.e. that Members are subject to the operation of the ordinary criminal law), the Court nevertheless indicated that the former Clause was intended to protect the integrity of the legislative process and "assure a co-equal branch of the governmentwide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch." *Id.*, at 616. Moreover, this protection is broad enough to immunize Members "against prosecutions that directly impinge upon or threaten the legislative process." *Id.*

It is important to note that although a Member may be immune from the operation of the criminal law where his conduct is within the "sphere of legitimate legislative activity" (*Id.* at 624), the fact that a particular act in some way "relates to" the legislative process is not necessarily a justification for immunity. Protection under the Speech and Debate Clause is available only where the Member's act is "clearly a part of the legislative process—the *due* functioning of the process." *United States* v. *Brewster*, 408 U.S. 501, 515–516 (1972). The test for determining what conduct is within the protected "sphere of legitimate legislative activity" under the Speech and Debate Clause was stated by Justice White as follows:

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. As the Court of Appeals put it, the courts have extended the privilege beyond pure speech or debate in either House, but "only when necessary to prevent indirect impairment of such deliberation." *United States* v. *Doe*, 455 F. 2d, at 760. *Gravel* v. *United States*, 408 U.S. 606, 625 (1972).

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In light of these considerations it seems appropriate to suggest several types of conduct which, in the case of an individual Member having possession of a classified document, should be protected under the Speech and Debate Clause. The following list is not intended to be exhaustive:

1. Any speech or debate on the Senate floor concerning the classified document.
2. Any speech during a committee meeting, hearing, etc.
3. Any reading from the classified document either on the Senate floor or in a committee meeting.
4. Any speech concerning the classified document in committee reports, hearings, or in resolutions.
5. Any placing of a classified document into the public record.
6. Any conduct at a committee meeting or on the Senate floor with respect to the classified document and any motive or purpose behind such conduct.
7. Any communications between a Member and aide during the term of the aide's employment with respect to the classified document

if related to a committee meeting or other legislative act of the Member.

As to those types of conduct for which it would seem no Speech or Debate Clause protection exists, the following, also not intended to be exhaustive, are illustrative:

1. Any act with respect to a classified document in preparation for a hearing which may be relevant to the investigation of third-party crime.

2. Any act with respect to a classified document in preparation for a hearing which is itself criminal, e.g., gathering defense information (18 U.S.C. Sec. 793).

3. Any act arranging for the private publication of a classified document.

4. Any act publishing a classified document privately.

5. Any speech or debate concerning the classified document delivered or conducted outside Congress; i.e., not in a committee meeting or on the Senate floor.

6. Any transmittal or communication concerning the classified document in newsletters or news releases to constituents or in answering constituent mail.

7. Any disclosure of the classified document on radio or television appearances.

Apart from any listing of acts and conduct which may be entitled to protection under the Speech and Debate Clause, another important aspect of the question concerning the legal rights of an individual Senator in possession of a classified document may be noted. The Court in *Gravel* indicated that it could not "perceive any constitutional or other privilege that shields . . . any . . . witness from grand jury questions relevant to tracing the source of obviously highly classified documents that came into the Senator's possession and are the basic subject matter of inquiry in this case, as long as no legislative act is implicated by the questions." *Id.* at 628. This analysis, as subsequently reflected in the Court's final order (see *Id.*, at 629) presents a dilemma to an individual Member which has been summarized as follows:

> . . . [T]he decision in *Gravel* may make it impossible for a Congressman to promise confidentiality to a would-be informant: where the release of information could constitute a crime and could therefore be investigated by a grand jury, the decision forces a Congressman either to refuse to promise confidentiality or to risk a contempt charge in a subsequent grand jury investgiation. ["The Supreme Court 1971 Term-Protection of Congressional Aides and Scope of Privileged Activity," 86 *Harv. L. Rev.* 189, 195 (1972).]

It should be mentioned that the *Gravel* Court also determined that the scope of immunity available to a Member's aide under the Speech and Debate Clause is coextensive with that of the Member himself. That is, any act of a Member's aide with respect to a classified document which would constitute a protected legislative act if done by the Member himself, is also immunized under the Clause. The rationale for this equal treatment of Member and aide "is that it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative

concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter ego; and that if they are not so recognized, the central role of the Speech or Debate Clause—to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary—will inevitably be diminished and frustrated." *Id.* at 616–617.

III. Legal Rights of a Senate Committee With Respect to Classified Documents in Its Possession

There would not seem to be any legal basis for a distinction between the rights of a committee or of a committee's staff in possession of classified documents and the rights of an individual Member or his aide. In essence, a committee is a group of Members and a committee staff is a group of aides. Moreover, although a committee enjoys some degree of independent status as an entity in its own right, it will be recalled that the protections of the Speech and Debate Clause are made expressly applicable to "Senators and Representatives." It would appear therefore, that the scope of permissible activities, in the case of a Senate committee or committee staff in possession of a classified document, would fall generally into those categories suggested *supra,* which were predicated upon the *Gravel* and *Brewster* decisions.

One additional point of importance concerning the legal rights of a committee can be noted in the *Gravel* Court's disposition of the Government's contention that the courts are free under the Speech and Debate Clause to question the "regularity" of the subcommittee meeting called by Senator Gravel which was allegedly "special, unauthorized, untimely" (at midnight), and for the purpose of reading the classified documents in his possession. The Court from the District Court's rejection of this argument where it was stated that:

> "Senator Gravel has suggested that the availability of funds for the construction and improvement of public buildings and grounds has been affected by the necessary costs of the war in Vietnam and that therefore the development and conduct of the war is properly within the concern of his subcommittee [Senate Subcommittee on Public Works]. The court rejects the Government's argument without detailed consideration of the merits of the Senator's position, on the basis of the general rule restricting judicial inquiry into matters of legislative purpose and operations." *United States* v. *Doe,* 332 F. Supp., at 935 . . . "It has not been suggested by the Government that the Subcommittee itself is unauthorized, nor that the war in Vietnam is an issue beyond the purview of congressional debate and action. Also the individual rights at stake in these proceedings are not those of a witness before a congressional committee or of a subject of a committee's investigation, but only those of a congressman and member of his personal staff who claim 'intimidation by the executive' " 332 F. Supp., at 936 quoted in *Gravel* v. *United States,* 408 U.S. 606, 610 n. 6 (1972).

The significance of this language is that a committee, or the Member thereof, seem to enjoy a large measure of insulation from Executive and Judicial inquiry into its proceedings. It would appear, therefore, that the proceedings of any committee with respect to a classified document in its possession will not be questioned for purposes of assessing "regularity" under the Speech and Debate Clause at least where (1) the committee itself is authorized, or (2) the subject matter of the classified document or perhaps the document itself is an issue within the constitutional purview of Congress, or (3) the rights of individuals are not threatened by the committee's proceedings.

LEGAL RIGHTS OF INDIVIDUAL MEMBERS WITH RESPECT TO DOCUMENTS OR INFORMATION RECEIVED FROM FOREIGN EMISSARIES

Although it might be useful in some cases, to distinguish between information and documents received from foreign emissaries which have been classified by the United States government [see 50 U.S.C. secs. 783 (b) (c) and 18 U.S.C. sec. 798] and information and documents which are either unclassified or classified by a foreign government without a reclassification by the United States, it is perhaps equally important to note generally that under the Espionage and Censorship provisions of the federal criminal code (18 U.S.C. secs. 792–799) it is a criminal act for any unauthorized possessor of *any* document "relating to the national defense" either 1) wilfully to communicate or cause to be communicated that document to any person not entitled to receive it, or 2) wilfully to retain the document and fail to deliver it to an officer of the United States entitled to receive it [see 18 U.S.C. sec 793 (e)]. Thus, under this prohibition both the source and the classification of the document are immaterial and any unauthorized possessor thereof faces grave risks.

It may be concluded that where an individual member has received a document or information from a foreign emissary, and where such document or information may be within the intendment of applicable criminal provisions, there would seem to be two alternatives under the present law: 1) the member may use the document or information to the extent that his immunity from the criminal law under the Speech and Debate Clause allows, or 2) he may comply with sections 4 (c) and (d) of Executive Order 11652, 37 *Fed. Reg.* 5209 (1972), which provide as follows:

> (c) *Information or Material Furnished by A Foreign Government or International Organization.* Classified information or material furnished to the United States by a foreign government or international organization shall either retain its original classification or be assigned a United States classification. In either case, the classification shall assure a degree of protection equivalent to that required by the government or international organization which furnished the information or material.
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> (d) *Classification Responsibilities.* A holder of classified information or material shall observe and respect the classification assigned by the originator. If the holder believes that there is an unnecessary classification, that the assigned classification is improper, or that the document is subject to declassification under this order, he shall so inform the originator who shall thereupon reexamine the classification.

THE DECLASSIFICATION OF DOCUMENTS IN THE POSSESSION OF AN INDIVIDUAL MEMBER

The question of the method by which an individual member may declassify a document in his possession seems to yield two approaches under the present law. First, the member may effect a kind of "declassification" by utilizing the documents in accordance with his privilege under the Speech and Debate Clause. A member could, for example, read from the classified document at a committee meeting as was done in *Gravel*. Strictly speaking, of course, this protected conduct on the part of a member does not technically "declassify" the document but it does make the document public, effectively defeating the classification. However, experience indicated that such effective declassification may contribute to a marked reluctance on the part of executive department officials to tender restricted information in the future.

A second alternative under present law for a member desiring to declassify a document in his possession is to submit the document to the appropriate government authority in accordance with section 4 (d) of E.O. 11652 quoted *supra*. Section 5 of E.O. 11652 contains the general declassification and downgrading guidelines. [Tab 3].

VI. PENDING BILLS AND PROPOSALS FOR CONGRESSIONAL MACHINERY TO OVERSEE CLASSIFIED INFORMATION MATTERS

Our earlier report discussed a number of bills now pending, that would effect changes in several of the matters discussed above. All of the bills noted would amend the Freedom of Information Act in one way or another except for the proposed new Federal Criminal Code provisions in S. 1400.

For purposes of this supplemental report, mention of two of the bills will provide a basis for further consideration and recommendations by the Committee. During deliberation, the matter was discussed of the possible establishment of machinery within the Senate for handling classified information. Senator Gravel's Bill, S. 1726, makes a number of proposals bearing on Congressional oversight and participation.

The bill proposes a mechanism whereby two Congressional committees would oversee all classification and declassification of government documents. The proposal, contained in section 103 of the proposed Public Information Act of 1973, mandates an automatic declassification of all materials after a two-year period of classified status. If the materials are thought to require a second two-year period of classification, the President or agency head charged with the declassification of such data must submit a detailed, written justification for the extension of classification for one additional two-year period. Such submission must be made to the Senate Committee on Government Operations, the House Committee on Government Operations and the Comptroller General of the United States.

The two Congressional committees are also charged with publication of an annual public document containing all of the written justifications for continued classification presented to them. Excepted from this public document are only those justifications which themselves are determined by the President or appropriate agency head to be classified. Even these expected writings are available upon request to any member of Congress.

An accessory safeguard to declassification is provided by making the Comptroller General an overseer of all agency classification and declassification. The Comptroller General would report semi-annually to both the Senate Committee on Government Operations and the House Committee on Government Operations setting forth finding of all inquiries or investigations he would make under the proposed Act. The reports would be made no later than March 1, and September 1, of each year.

The "Gravel" Bill would also create an Office of the General Counsel to the Congress. The duties of the General Counsel would presumably include advising the Senate Committee on Government Operations and the House Committee on Government Operations on the excepting of some materials from automatic biennial declassification and the other supervisory decisions assigned to the committees by the proposed Act.

Another bill, S. 1520, would establish a study commission which could make recommendations to the Congress in the classified information field "including the proper performance of its duties." As previously observed, the Commission's charge would be similar to that undertaken by S. Res. 13.

Finally, mention needs to be made again of S. 1142 introduced by Senator Muskie and H.R. 5425, introduced by Congressman Moorehead. These bills would strengthen the Freedom of Information Act's disclosure provisions in several respects. The provision of special significance to the subject of this memorandum, however, relates and refers directly to the classified information exemption of the *Mink* case. It reads as follows:

> (2)(A) Notwithstanding subsection (b), any agency shall furnish any information or records to Congress promptly upon written request to the head of such agency by the Speaker of the House of Representatives, the President of the Senate, or the chairman of any such committee, as the case may be.

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VII—Recommendations of the Committee

Recommendations

I. The Committee recommends a re-examination of the broad grant of discretion given by the Congress to the President and implemented by Executive Order to classify and restrict the use and circulation of government documents. The Committee urges that a statutory framework for the classification system be set up and that guidelines specifically defining areas of National security be established.

The extent to which Congress has ceded this authority to the executive is discussed from an historical perspective in this report and is emphasized in the Supreme Court decision in *Environmental Protection Agency, et. al.* v. *Mink*, 410 US 73 (1973) wherein the Court held that under existing law not even the courts could look beyond an executive determination in this area. "Congress chose", wrote Justice Stewart, "to decree blind acceptance of executive fiat."

In enacting the Freedom of Information Act Congress created "an exemption that provides no means to question an Executive decision to stamp a document 'secret', however cynical, myopic, or even corrupt

that decision might have been." The Committee suggests that the machinery be set up for questioning in an orderly manner these executive decisions to classify for reasons of National security, and we urge the Government Operations Committee to give priority consideration to bills now pending before it and discussed herein designed to accomplish this objective. We make no detailed evaluation of these bills, leaving that to the judgment of the substantive committee but urge that a complete overhaul of the classification system be undertaken at the earliest possible time.

II. The question of procedures to be followed by a member who has classified documents in his possession, prior to his disclosure of those documents, was discussed by the Committee.

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The Committee recommends that individual members who have such documents and wish to disclose them, consult with the Senate Ethics Committee prior to such disclosure.

The Committee wishes to make it clear that although it recommends consultation with the Ethics Committee, any determination by the Ethics Committee would not be binding on the member. The reason for the recommendation of consultation is to permit a member the opportunity of getting the additional thinking and precedents available to him before making a final decision regarding disclosure.

III. At the request of Senator Cranston, the Committee discussed providing the Senate the overall sums requested for each separate intelligence agency. The release of such sums would provide members with the minimal information they should have about our intelligence operations. Such information would also end the practice of inflating certain budget figures so as to hide intelligence costs, and would insure that all members will know the true cost of each budget item they must vote upon.

Accordingly, the Committee recommends that the Appropriations Committee itemize in the Defense Department Appropriations bill the total sums proposed to be appropriated for intelligence activities by each of the following agencies: Central Intelligence Agency, Defense Intelligence Agency, National Security Agency, National Reconnaissance Office and any separate intelligence units within the Army, Navy, and Air Force. The Committee does not request that any line items be revealed.

The Committee also recommends that the committee reports indicate the total number of personnel to be employed by each of the above agencies. The Committee does not request any information about their duties.

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